## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN RED CROSS BLOOD SERVICES, WESTERN LAKE ERIE REGION,

Respondent,

Case No. 08-CA-090132

and

THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75,

**Charging Party.** 

EXCEPTIONS OF RESPONDENT,
AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION,
TO THE DECISION OF ADMINISTRATIVE LAW JUDGE
MARK CARISSIMI

Pursuant to the Rules and Regulations of the National Labor Relations Board, as amended, Respondent, the American Red Cross Blood Services, Western Lake Erie Region (the "Region" or "Respondent"), by the undersigned counsel, respectfully files the following Exceptions to the Decision and Recommended Order of Administrative Law Judge Mark Carissimi ("Decision") in the above-captioned case. Separately, the Region is also simultaneously filing with the NLRB a Brief in support of these Exceptions:

Exception No. 1. Respondent excepts to the Decision's finding that the NLRB has the authority to decide the instant matter and that the Administrative Law Judge had the authority to issue the Decision in this matter. ALJD 2:46-3:2.

Exception No. 2. Respondent excepts to the Decision's conclusion that amendments to the Complaint sought by the Acting General Counsel were sufficiently related to the existing allegations, that the amendments should be granted, and that the Respondent was not prejudiced by permitting the amendments. ALJD 3:17; 3:30-36.

Exception No. 3. Respondent excepts to the Decision's finding that the Complaint and its amendments were clearly sufficient for due process purposes. ALJD 4:14-15.

Exception No. 4. Respondent excepts to the Decision's conclusion that under the circumstances of the instant matter, the Region was not denied due process. ALJD 4:22-23.

Exception No. 5. Respondent excepts to the Decision's finding that the circumstances of this matter were "far different" from those present in *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). ALJD 4:27-28.

Exception No. 6. Respondent excepts to the Decision's findings: that the Complaint allegations in the instant matter were clear; that Respondent was aware of the legal issues presented by the Complaint at the time of hearing and expanded on those issues in its brief; and that Respondent "clearly had an opportunity to fully and fairly defend itself" against the Complaint's allegations. ALJD 4:34-39.

Throughout these Exceptions, references to the Decision will be designated as follows: ALJD (followed by page and line numbers).

Exception No. 7. Respondent excepts to the Decision's conclusion that the Complaint should not be dismissed because the Respondent was not denied due process. ALJD 4:38-39.

**Exception No. 8.** Respondent excepts to the Decision's characterization that the Acting General Counsel and/or the Charging Party "specifically identified rules and policies" that were alleged to violate the NLRA. ALJD 5:8-9.

Exception No. 9. Respondent excepts to the Decision's finding that a "fair reading" of the Region's 2005 Confidential Information and Intellectual Property Agreement ("CIIPA") provides that confidential information includes information relating to the Region's personnel or employees and that such information cannot be disclosed either during or after an employee's employment. ALJD 8:9-11.

Exception No. 10. Respondent excepts to the Decision's finding that confidential information as utilized in the 2005 CIIPA includes information regarding personnel and employees. ALJD 8:16-17.

Exception No. 11. Respondent excepts to the Decision's conclusion that the 2005 CIIPA would be reasonably understood by employees to prohibit the disclosure of information, including wages and terms and conditions of employment, to other employees or to non-employees such as Union representatives. ALJD 8:17-19.

Exception No. 12. The Respondent excepts to the Decision's reliance upon Flex Frac Logistics, LLC, 358 NLRB No. 127 (2012). ALJD 8:2-3; 8:20-22.

Exception No. 13. Respondent excepts to the Decision's reliance upon *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012). ALJD 8:24–9:22.

Exception No. 14. Respondent excepts to the Decision's failure to properly analyze the Region's "Communications System" policy. ALJD 8: 39-48, n.5

Exception No. 15. Respondent excepts to the Decision's reliance upon DirecTV US DirecTV Holdings, LLC, 359 NLRB No. 54 (2003). ALJD 9:24-36.

Exception No. 16. Respondent excepts to the Decision's reliance upon Sheraton Anchorage, 359 NLRB No. 95 (2013); Hyundai America Shipping Agency, Inc., 357 NLRB 80 (2011); Cintas Corp., 344 NLRB 943 (2005) enf'd. 42 F.3d 463 (D.C. Cir. 2007); IRIS U.S.A. Inc., 336 NLRB 1013 (2001); University Medical Center, Inc., 335 NLRB 1318 (2001); Flamingo Hilton-Laughlin, 330 NLRB 287 (1999). ALJD 9:38–10:9.

**Exception No. 17.** Respondent excepts to the Decision's conclusion that the confidentiality provision of the Region's 2005 CIIPA is facially overbroad. ALJD 10:12-12.

Exception No. 18. Respondent excepts to the Decision's finding that the Region's confidentiality policy in the instant matter is distinguishable from the "code of conduct" found lawful in *Lafayette Park Hotel*, 326 NLRB 824 (1998) and *Super K-Mart*, 333 NLRB 263 (1999). ALJD 10:11-20.

Exception No. 19. Respondent excepts to the Decision's failure to conclude that a "savings clause" contained in the Region's 2005 CIIPA does not cure the allegedly unlawful effects of the language in that document. ALJD 10:22-31.

Exception No. 20. Respondent excepts to the Decision's finding that the "savings clause" in the Region's 2005 CIIPA would be effective only if employees are knowledgeable about the National Labor Relations Act ("NLRA") and that employees would instead decide to comply with an unlawfully broad restriction on their Section 7 rights rather

than undertaking the task of determining the exact nature of those rights and then attempting to assert those rights under the savings clause. ALJD 10:31-39.

Exception No. 21. Respondent excepts to the Decision's conclusion that the Region violated Section 8(a)(1) of the NLRA by maintaining a facially overbroad confidentiality provision in the 2005 CIIPA. ALJD 10:40-42.

Exception No. 22. Respondent excepts to the Decision's finding that the Region's 2005 CIIPA, its Code of Conduct, and its Employee Handbook are overlapping, such that all three govern the disclosure of confidential information and that the 2005 CIIPA therefore defines the nature of what the Region considers to be confidential information for purposes of the Code of Conduct and the Employee Handbook. ALJD 10:46–11:2.

Exception No. 23. Respondent excepts to the Decision's finding that employees who read the three documents would understand that the Code of Conduct and the Employee Handbook prohibit the disclosure of information regarding personnel and employees.

ALJD 11:4-6.

Exception No. 24. Respondent excepts to the Decision's conclusion that the general confidentiality provision in the Code of Conduct and Employee Handbook are also facially overbroad, because they do not define "confidential" differently than the 2005 CIIPA. ALJD 11:6-8.

Exception No. 25. Respondent excepts to the Decision's finding that any ambiguity in the general confidentiality provision contained in the Code of Conduct and the Employee Handbook must be resolved against the position of the Region. ALJD 11:8-12.

Exception No. 26. Respondent excepts to the Decision's conclusion that the general confidentiality provisions contained in the Code of Conduct and the Employee Handbook are facially overbroad and violate Section 8(a)(1) of the NLRA. ALJD 11:12-13.

Exception No. 27. Respondent excepts to the Decision's finding that the specific Employee Handbook provision relating to the release of confidential employee information without authorization is "clearly facially overbroad" and would reasonably be understood by employees to prohibit the disclosure of information regarding wages and terms and conditions of employment to other employees or to Union representatives. ALJD 11:15-19.

Exception No. 28. Respondent excepts to the Decision's finding that the record evidence establishes that the Region maintained a 1993 confidentiality policy in effect during the Section 10(b) period by making reference to it as a basis for the discharge of Amanda Laursen on May 24, 2012. ALJD 11:26-30.

Exception No. 29. Respondent excepts to the Decision's finding that the 1993 confidentiality policy is overbroad, because it prohibits the disclosure of information in personnel records, litigation and financial information. ALJD 12:11-13.

Exception No. 30. Respondent excepts to the Decision's finding that prohibiting the disclosure of all personnel and financial information unlawfully restricts employees from discussing with others information about terms and conditions of employment, including wage information, that an employee has gained in the normal course of duties and from discussions with other employees. ALJD 12:14-17.

Exception No. 31. Respondent excepts to the Decision's finding that the prohibition against disclosing information regarding litigation is overbroad and restrains Section 7 rights, in that it would preclude employees from discussing NLRB and EEOC litigation and

labor arbitrations and therefore is an overly broad restriction on Section 7 rights. ALJD 12:17-20.

**Exception No. 32.** Respondent excepts to the Decision's finding that it did not produce evidence to establish a legitimate business justification for a prohibition against disclosing all information regarding litigation. ALJD 12:20-22.

Exception No. 33. Respondent excepts to the Decision's reliance upon Banner Estrella Medical Center, 358 NLRB No. 93 (2012). ALJD 12:22-28.

Exception No. 34. Respondent excepts to the Decision's finding that the NLRB's policies regarding internal investigations would apply with equal force to matters that are at the litigation stage. (ALJD 12:28-29).

Exception No. 35. Respondent excepts to the Decision's conclusion that Respondent's 1993 confidentiality policy is overbroad and violates Section 8(a)(1) of the NLRA. ALJD 12:30-31.

Exception No. 36. Respondent excepts to the Decision's finding that the Region never rescinded the 2002 CIIPA. ALJD 12:36.

Exception No. 37. Respondent excepts to the Decision's finding that it "appears" that the Region maintained the 2002 Confidentiality Agreement during the Section 10(b) period by making reference to it in Heidi Coutchure's discharge in May 2012. ALJD 12:38-40.

Exception No. 38. Respondent excepts to the Decision's finding that by prohibiting employees from disclosing to "persons outside of the Red Cross" any information relating to "benefits, compensation, equal employment opportunity matters or employees" unless

authorized, the 2002 CIIPA is an overly broad restriction of employees' Section 7 rights. ALJD 13:7-11.

Exception No. 39. Respondent excepts to the Decision's finding that the 2002 CIIPA was maintained during the Section 10(b) period and that the Region therefore violated Section 8(a)(1) of the NLRA. ALJD 13:11-12.

Exception No. 40. Respondent excepts to the Decision's finding that some of the Region's rules and policies are facially unlawful and violate Section 8(a)(1) of the NLRA.

ALJD 26:29-30.

**Exception No. 41.** Respondent excepts to the Decision's provision of a remedy that prohibits the Region from enforcing allegedly unlawful rules and policies and requiring it to rescind them. ALJD 26:30-31.

Exception No. 42. Respondent excepts to the Decision's failure to provide any findings of fact, conclusions, and reasons or basis therefore, based upon material issues of fact and law presented on the record, with respect to its findings concerning the Region's "Communications Systems" policy.

Exception No. 43. Respondent excepts to the Decision's "Conclusions of Law." ALJD 26:44-27:43.

Exception No. 44. Respondent excepts to the Decision's "Remedy." ALJD 28:3-22.

Exception No. 45. Respondent excepts to the Decision's proposed "Order." ALJD 28:24-31:17.

**Exception No. 46.** Respondent excepts to the Administrative Law Judge's failure to rule upon its Motion to Correct Transcript which was filed on March 26, 2013 and which was unopposed.

DATED: August 2, 2013

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I, Steven W. Suflas, hereby certify and state that on August 2, 2013, I caused a true and correct copy of the foregoing Exceptions to the Decision of Administrative Law Judge Mark Carissimi to be served by electronic mail upon the following:

Gina Fraternali, Esquire Counsel for the Acting General Counsel National Labor Relations Board, Region 8 AJC Federal Building, Rm. 1695 1240 East Ninth Street Cleveland, OH 44199 Gina.fraternali@nlrb.gov

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 2, 2013

Steven W. Suflas, Esquire

Ballard Spahr LLP

Counsel for Respondent